STATE OF MICHIGAN

COURT OF APPEALS

MUSKEGON AREA RENTAL ASSOCIATION, ROGER NIELSON, and ARTHUR JASICK, Plaintiffs-Appellants, v CITY OF MUSKEGON, Defendant-Appellee.	FOR PUBLICATION December 26, 2000 9:05 a.m. No. 217854 Muskegon Circuit Court LC No. 98-038490-AZ Updated Copy February 16, 2001

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

BANDSTRA, C.J. (*concurring in part and dissenting in part).*

I concur with the decision of the majority that the ordinance at issue here is not preempted by state law, does not conflict with defendant's charter, and does not deny plaintiffs substantive due process. I dissent with respect to the equal protection challenge to the ordinance and would affirm the trial court's grant of summary disposition to defendant on this ground as well.

It is helpful to begin with a brief summary of equal protection law. Judicial review of legislative enactments employs one of three tests to determine constitutionality under the Equal Protection Clauses. See, generally, *Crego v Coleman,* 463 Mich 248, 259-261; 615 NW2d 218 (2000). The highest standard, "strict scrutiny," applies to legislative classification schemes that are based on a suspect factor (such as race, national origin, or ethnicity) or that impinge on the exercise of a fundamental right. *Doe v Dep't of Social Services,* 439 Mich 650, 662; 487 NW2d 166 (1992). With regard to those classification schemes, the burden is on the legislative body to

"demonstrate[ ] that its classification scheme has been precisely tailored to serve a compelling governmental interest." *Id.*

"Heightened scrutiny" review applies to legislation creating classifications on such bases as illegitimacy and gender. *Crego, supra* at 260. To be upheld, those classifications must be "substantially related to an important state interest . . . ." *Id.* at 261. Thus, for purposes of "heightened scrutiny" review as compared with "strict scrutiny" review, the challenged classification is more easily defended; the test to be applied is not as stringent with respect to either the interest being pursued or the manner in which the classification scheme would advance that interest ("substantially related to an important state interest" rather than "precisely tailored to serve a compelling governmental interest").

The third standard of review, "rational basis," is even more deferential:

> Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. [*Crego, supra* at 259-260 (citations omitted).]

Thus, in contrast to the higher scrutiny standards, the burden is clearly placed on the party challenging the legislative scheme and that burden is heavy. There must be proof that the classification is arbitrary and wholly unrelated to any legitimate government purpose.

The legislative classification scheme here does not impinge on the exercise of any fundamental right and it is not based on any suspect factor. Accordingly, we must employ the rational basis test in reviewing the equal protection challenge to it. *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996).[1] The dispositive question is whether plaintiffs have met their "heavy burden" of proof by showing that defendant's classification scheme is "arbitrary and wholly unrelated in a rational way" to "a legitimate government purpose." *Crego, supra* at 259-260. If not, and if the legislative scheme can be "supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable," we must conclude in favor of finding constitutionality. *Id.* at 260.

Through affidavits and deposition testimony, defendant articulated a special problem it has with rental property owners, in contrast to other businesses. This evidence was summarized by the trial court:

> The 1990 Census of Population and Housing shows that 45% of Muskegon's 14,767 occupied housing units were rental units. Undisputed sworn testimony demonstrates that a substantial majority of rental properties which are not current in their tax payments are deteriorated, and unsafe for human occupancy. When they deteriorate, the City generally does not apply to receive these tax reverted properties. Tax delinquency carries over to lack of interest in providing safe rentals for the public. Finally, the City's tax collection percentage is lower than the majority of Michigan municipalities. This results in higher interest costs when the City borrows or issues bonds.

The purpose of defendant's treating rental property businesses differently than other businesses is apparent. By requiring payment of taxes "up front," before units can be rented, defendant seeks to reduce the fiscal, safety, health, and welfare problems that result disproportionately from rental properties.[2]

The majority states that defendant's position regarding the rational basis for this classification scheme "is not supported in any way by record evidence." *Ante* at ___. I first note that the majority's analysis in this regard ignores the presumption of constitutionality that defendant's ordinance enjoys and the corresponding heavy burden of proof that plaintiffs must bear to show that the ordinance is unconstitutional. In effect, the majority places the burden of proof on defendant, as if this is a "strict scrutiny" case. The question here is not whether defendant has proved the rational basis for the classification scheme. The question is whether plaintiffs have come forward with evidence sufficient to show defendant's ordinance to be arbitrary and wholly unrelated to a legitimate government purpose.

I conclude they have not. There has been no showing that rental properties are not disproportionately tax delinquent compared to properties owned by other businesses. In fact, the record includes admissions by members of the Muskegon Area Rental Association that allowing rental properties to become delinquent is a common business practice. Defendant has articulated reasons why its failure to promptly receive taxes when due causes fiscal problems, and plaintiffs have offered no evidence to suggest that those problems do not result from tax delinquencies. Thus, if the purpose of the classification scheme here was simply to encourage prompt payment of taxes for fiscal reasons, by enacting a special penalty against a class of property owners who disproportionately are tax delinquent, the classification would pass constitutional muster.

However, defendant has articulated other reasons for treating rental property owners differently than other businesses. In sum, defendant's position is that the deteriorating conditions of residential properties are commonly the result of, or exacerbated by, the failure to pay taxes when due. This seems a commonsense conclusion to anyone familiar with "urban blight." It is

certainly at least "rational speculation" on defendant's part. See *Alexander v Merit Systems Protection Bd*, 165 F3d 474, 484 (CA 6, 1999) ("legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data"). Again, plaintiffs have not shown that there is no relationship between housing deterioration and tax delinquency or otherwise proved that the classification scheme at issue here has no "rational basis" in this regard.[3]

I would affirm the decision of the trial court granting summary disposition to defendant on all grounds.

/s/ Richard A. Bandstra

[1] Plaintiffs expressly conceded in their brief that the rational basis test applies here. It does not appear that the majority disagrees with this conclusion. It relies on *Brittany Park Apartments v Harrison Charter Twp*, 432 Mich 798, 804; 443 NW2d 161 (1989), which reiterates the rational basis test. *Ante* at ___. The majority also, however, relies on *Alexander v Detroit*, 392 Mich 30, 35-36; 219 NW2d 41 (1974), which utilizes a two-pronged test for rational basis analysis. This two-pronged test does not fit nicely into the judicial review scheme outlined above. However, that test does seem to concentrate on the "reasonableness" of the classification in relation to its object or purpose, consistent with the "rational basis" test. In any event, to the extent that *Alexander* is inconsistent with more recent Michigan Supreme Court precedents cited above, those precedents are controlling.

[2] This is not to say that all rental property owners fail to pay their taxes, that other businesses always pay their taxes, or that the failure of other businesses to do so leads to no problems. Defendant is not required to construct a classification scheme with "mathematical nicety" to prevent any inequities. *Crego, supra* at 260.

[3] It seems the majority simply disagrees with defendant about whether requiring an occupancy permit is an effective approach for addressing the problems associated with tax delinquencies. However, "rational-basis review does not test the wisdom . . . or appropriateness" of a classification scheme, *Crego, supra* at 260.